SHOULD NATIONAL SECURITY TRUMP HUMAN RIGHTS IN THE FIGHT AGAINST TERRORISM?

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I. INTRODUCTION

It is unsurprising that the role of human rights in the counterterrorism discourse has become an issue of major concern to those broadly associated with human rights. In securing the right to life in their fight against non-State terrorists, States cannot act in a vacuum. International human rights law, involving as it does positive and negative State obligations, requires a delicate juggling act by States when fighting terrorism.[1]

This paper addresses some important issues in the context of human rights and counterterrorism. It begins by exploring the applicable legal framework in the current counterterrorism context, with particular emphasis on the United States' engagement with Al Qaeda. Arguing that an armed conflict model is the most convincing approach, it then asks how international human rights law applies during armed conflicts and looks at how international actors have attempted to frame human rights in a way that appeals to States' self-interest. This paper then critically engages in the debate by exploring whether human rights observance is necessary, in an empirical sense, to effectively fight terrorism.[2] It concludes with a sobering assessment of the legal landscape in light of the perilous reality of human rights and counterterrorism.

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[1] For a discussion of international human rights law in the context of terrorism, *see* H. Duffy, *The 'War on Terror' and the Framework of International Law* 301-32 (2005).

[2] For similar concerns, *see* B. Dunér, "Disregard for Security: The Human Rights Movement and 9/11", 17(1-2) *Terrorism & Pol. Violence* 89, 91 (2005) (assessing the "question of a *trade-off* between security and human rights … and … the *instrumentality* of human rights for security").

II. THE APPLICABLE LEGAL FRAMEWORK

Given that the law acts as an overarching framework that provides a reference point for judgment, human rights analysis must begin by identifying the applicable legal framework. Once this is done, the identified regime can be applied to particular facts and circumstances, and conclusions can be drawn as to the legality or illegality of a State's actions or omissions. This, of course, presumes that the relevant legal framework can be identified with some degree of predictability and certainty. This section focuses in particular on the United States' engagement with Al Qaeda.

Taft sketches as potentially applicable to the United States' engagement with Al Qaeda the legal regimes that have historically applied during wartime and peacetime, or, respectively, international humanitarian law and criminal law, yet argues that the preferred approach would involve a "new system whose rules are well understood and take account of both the need to protect our citizens and assure that we accurately identify, effectively deter, and appropriately punish those who pose threats to our society or have committed criminal acts".[3] As a non-State terrorist organisation, he notes that Al Qaeda cannot be considered to be bound by the Geneva Conventions as a matter of treaty law because it does not have the capacity to enter into such agreements.[4] However, given the gravity of the terrorist threat and the inherently political nature of Al Qaeda's agenda and choice of means, Taft argues for a framework rooted in the "law of armed conflict modified to adapt to those unconventional aspects".[5]

Posner's argument broadly resembles Taft's.[6] The former's approach, however, acknowledges a greater number of legal permutations potentially applicable in the current counterterrorism context, namely international humanitarian law, criminal law, a *lacuna* in which international humanitarian law does not apply, and an altered international humanitarian law.[7] According to Posner, applying the laws of war completely to Al Qaeda could potentially mean granting its captured combatants widespread protection.[8] He is critical of another potentially applicable legal framework,

3 W.H. Taft, "Keynote Address", 21(2) *Am. U. Int'l L. Rev.* 149, *id.* (2005).

4 *Ibid.,* 154. Of the Geneva Conventions, Judge Higgins of the ICJ has said that "[i]t does remain an area where some of the provisions sit very awkwardly with non-state actors and with actors who even if states are not parties". A Conversation with Secretary of State Condoleezza Rice, Centennial Annual Meeting of the American Society of International Law, *available at:* http://www.state.gov/secretary/rm/2006/63855.htm (29 Mar. 2006).

5 Taft, *supra* note 3, at 150.

6 E.A. Posner, "Terrorism and the Laws of War", 5(2) *Chi. J. Int'l L.* 423 (2005).

7 *Id.*

8 *Ibid.,* 431.

criminal law, because it ignores the inherently political *raison d'être* of Al Qaeda and its ability to act coherently and strategically.[9] At the same time, Posner recognises that two philosophical underpinnings of the laws of war, namely symmetry and reciprocity, which he defines, respectively, as the "condition [that] requires that the laws of war generate military advantages for neither belligerent … [and t]he … condition [that] requires that each belligerent have the ability to retaliate when the other belligerent violates the laws of war",[10] sit uneasily in the current environment, which Pfanner describes as asymmetrical warfare,[11] and thus, Posner favours an approach that appreciates this dynamic.[12] Casey and Rivkin pick up on the reciprocity issue and argue that a wilful blindness to its place in the current environment can be likened to "sending a gambler to the tables with an ironclad guarantee that he's 'covered'".[13]

Across the Atlantic Ocean, Greenwood, writing in 2002, sits uncomfortably with the characterisation as mere crime, however serious, of the threat posed by Al Qaeda terrorism.[14] He cites the Security Council's

9 *Ibid.,* 431-32. Osama bin Laden coherently laid out Al Qaeda's political manifesto in his "Letter to America", in which, to name a few of his demands, he insisted upon conversion to Islam, criticised the notion of secular politics, gambling, homosexuality, and interest on investments, and blamed the United States for the spread of AIDS. *See* Full Text: Bin Laden's "Letter to America", *Observer,* (Q2)(1)-(7), *available at:* http://observer.guardian.co.uk/worldview/story/0,11581,845725,00.html (24 Nov. 2002). Egyptian militant Islamist Sayyid Qutb saw in usury an "aim … [to ensure] that all the wealth of mankind end up in the hands of Jewish financial institutions which run on interest". S. Qutb, *Milestones* 111 (2005).

10 Posner, *supra* note 6, at 424. *See* T. Pfanner, "Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action", 87(857) *Int'l Rev. Red Cross* 149, 161 (2005).

11 Pfanner, *supra* note 10, at 150 (defining asymmetrical warfare as that in which "the parties are unequal and the principle of equality of arms no longer holds true. The belligerents have disparate aims and employ dissimilar means and methods to pursue their tactics and strategies").

12 *See* Posner, *supra* note 6, at 427-34.

13 L.A. Casey & D.B. Rivkin, Jr., "Rethinking the Geneva Conventions", in *The Torture Debate in America* 203, 205 (K.J. Greenberg ed., 2006). Casey and Rivkin also assert that "[o]ne potential solution, both in terms of applying the Geneva Conventions in instances where the United States engages a noncompliant Geneva party and vis-à-vis al Qaeda, would be adoption of a reciprocity rule. This need not involve resort to tit-for-tat reprisals, but could be a flexible approach whereby the United States takes account of its opponent's compliance record in its own interpretation and application of the treaties". *Ibid.,* 204. For another discussion of reciprocity, *see* G.L. Neuman, "Humanitarian Law and Counterterrorist Force", 14(2) *E.J.I.L.* 283, 283-87 (2003).

14 C. Greenwood, "International Law and the 'War Against Terrorism'", 78(2) *Int'l Aff.* 301 (2002).

classification of terrorism as a threat to international peace and security,[15] something which with regard to non-State actors International Court of Justice [ICJ] Judge Kooijmans recognised in his Separate Opinion during the summer of 2004 in the *Wall Advisory Opinion* as a "completely new element … the legal implications of which cannot as yet be assessed but which marks undeniably a new approach to the concept of self-defence".[16] Greenwood asserts a need for international law to appreciate in its threat perception that modern terrorism in the form of Al Qaeda involves a "terrorist organization operating outside the control of any state [that] is capable of causing death and destruction on a scale comparable with that of regular military action by a state".[17] The classical notion of a power hierarchy between States and non-State actors, with the former in a horizontal relationship with each other and in an overbearing vertical relationship with the latter, Greenwood argues, may be outdated and in need of adaptation.[18]

These arguments favouring an international humanitarian law perspective toward Al Qaeda broadly resemble the United States' position since 11 September 2001.[19] According to the Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba, there exists an armed conflict, as international humanitarian law understands that legally-loaded term, between the United States and Al Qaeda, the applicable legal framework existing outside treaty law in the realm of customary international humanitarian law.[20] The key point is "the existence of an armed conflict[,] … determined *inter alia* by the intensity, and scope and duration of hostilities, not by whether the situation is afforded Geneva Convention

15 *Ibid.,* 306-07. *See also* Y. Dinstein, "*Ius ad Bellum* Aspects of the 'War on Terrorism'", in *Terrorism and the Military: International Legal Implications* 13, 15-16 (W.P. Heere ed., 2003).

16 Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] *I.C.J. Rep*., para. 35 (Kooijmans J., Separate Opinion).

17 Greenwood, *supra* note 14, at 307. *See also* R. Wedgwood, "Al Qaeda, Terrorism, and Military Commissions", 96(2) *A.J.I.L.* 328, *id*. (2002).

18 Greenwood, *supra* note 14, at 301. According to Pfanner, "[a]symmetrical wars fit in neither with Clausewitz's concept of war nor with the traditional concept of international humanitarian law"; *supra* note 10, at 173.

19 The United States' position can be contrasted with the European approach. *See* A. Kroeger, "New Challenges Strain EU-US Ties", BBC News, 1 June 2006, *available at:* http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/5036282.stm.

20 Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba, 45(3) *I.L.M*. 742, 748 (2006).

protection".[21] While it is true that the United States Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld* held that Common Article 3 of the Geneva Conventions applies to the United States' engagement with Al Qaeda,[22] it should be stressed that, since Common Article 3 itself only operates within an armed conflict paradigm, this decision, while disappointing to the executive branch,[23] does not fundamentally question the applicability of international humanitarian law and an armed conflict paradigm.

It should be noted that an international humanitarian law framework brings with it a number of strategic advantages to the United States in combating Al Qaeda, including combatant detention, non-coercive interrogation and intelligence gathering, and a clear set of guidelines for combatants.[24] It can also be pointed out that the United States' peacetime criminal justice system failed to stymie Al Qaeda's ambitions and avert 11 September.[25] Referring to the United States' attack on Al Qaeda operatives in Yemen in 2002, Pejic argues that a non-armed conflict paradigm could have sufficed in that example, although she concedes that such a framework would have required individualised evidence of an imminent and serious threat to life, the attack having been done as a last resort and with the consent of the target State, and that there have been an investigation with review provision after the fact.[26] Furthermore, again referring to the same example, Pejic asserts that "the suspects' mere 'membership' in al-Qaeda (whatever that may mean) would clearly not have been a sufficient reason to

21 *Ibid.*, 749. This argument is strengthened by the fact that Al Qaeda's Osama bin Laden has clearly recognised an armed conflict posture. Over three and a half years before 11 September, for example, he publicly stated that "[a]ll these crimes and sins committed by the Americans are a clear declaration of war on God, his messenger, and Muslims". Shaykh Usamah Bin-Muhammad Bin-Ladin *et al*., "Jihad Against Jews and Crusaders: World Islamic Front Statement", *Wash. Post,* 23 Feb. 1998, *available at:* http://www.washingtonpost.com/ac2/wp-dyn/A4993-2001Sep21?language=printer (2001). *See also* Pfanner, *supra* note 10, at 155-56.

22 Hamdan v. Rumsfeld, No. 05-184, slip op. at 66-69 (*U.S. S. Ct.,* 29 June 2006).

23 Rivkin and Casey call the decision "a setback with a sterling silver lining … Together with the Supreme Court's 2004 decision in *Hamdi v. Rumsfeld* – directly affirming the government's right to capture and detain, without criminal charge or trial, al Qaeda and allied operatives until hostilities are concluded – *Hamdan* vindicates the basic legal architecture relied upon by the administration in prosecuting this war". D.B. Rivkin, Jr., & L.A. Casey, "Hamdan: What the Ruling Says – And What It Doesn't Say", *Wall St. J*., 3 July 2006, *available at:* http://www.opinionjournal.com/extra/?id=110008599.

24 *See* Taft, *supra* note 3, at 150-52.

25 *See* Casey & Rivkin, *supra* note 13, at 210; Wedgwood, *supra* note 17, at 329-30.

26 J. Pejic, "Terrorist Acts and Groups: A Role for International Law?", 75 *B.Y.B.I.L*. 71, 90-91 (2004).

kill them".[27] Outside of armed conflict, she is generally correct, but within an armed conflict framework, "mere 'membership'" suffices to ensure a legitimate military target on the battlefield. If one were to apply Pejic's criteria to the fatal bombing by air of Al Qaeda's Abu Musab al-Zarqawi,[28] a strong case can be made that several of her criteria would not have been met. This suggests the strategic advantages of an international humanitarian law framework.

A fundamentally contrasting perspective to the question of the applicable legal framework in the current counterterrorism context is that a war mentality does not apply.[29] According to Paust, the very fact that Al Qaeda cannot be considered a State, belligerent nation, or insurgency means that, *ipso facto*, international humanitarian law does not apply to its engagement with States, including its engagement with the United States.[30] Nonetheless, although he argues that the non-State, non-belligerent, non-nation, and non-insurgency nature of Al Qaeda generally precludes the triggering of international humanitarian law, Paust distinguishes those situations in which Al Qaeda is involved in a conflict in which States are on opposing sides, such as Afghanistan post-11 September and Iraq after the United States-led invasion of March 2003.[31] In a statement issued just days after 11 September, Schabas also reflected a State-centric understanding of international law, stating that, "according to [… it], we must know what State committed it. A group of individuals, even numbering in the hundreds, cannot commit an 'act of war'".[32]

Pejic also generally rejects the applicability of international humanitarian law to States' engagements with Al Qaeda: "[n]ot only is the violence not inter-state, it is also clear that states would never 'legitimise' the non-state 'adversary' by granting groups perpetrating terrorist acts … status and rights

27 *Ibid.,* 91.

28 On this incident, *see* "How Zarqawi Was Found and Killed", BBC News, *available at*: http://news.bbc.co.uk/2/hi/middle_east/5060468.stm (last updated 9 June 2006).

29 *See* International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Excerpt of the Report Prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, Geneva, Dec. 2003, 86(853) *Int'l Rev. Red Cross* 213, 232-33 (2004).

30 *See* J.J. Paust, "Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions", 79(4) *Notre Dame L. Rev*. 1335, 1340-42 (2004).

31 *Id*.

32 W.A. Schabas, "Statement of 17 September 2001", *available at:* http://www.nuigalway.ie/human_rights/Docs/Press%20Releases/170901%20PR.doc (2001).

in combat and upon capture".[33] According to her, because Al Qaeda is not sufficiently cohesive as a non-State organisation and because the actions taken against it do not trigger the law of armed conflict, a criminal law framework, not an armed conflict framework, applies.[34]

While the International Committee of the Red Cross [ICRC] is clearly correct in noting that "international humanitarian law is applicable when the 'fight against terrorism' amounts to, or involves, armed conflict",[35] the fundamental disagreement between those who argue that a customary international humanitarian law framework governs the relationship between the United States and Al Qaeda and those who prefer a criminal law model relates to whether it can legally be said that an armed conflict exists between the United States and Al Qaeda.[36] Rona concedes the definitionally problematic and indeterminate nature of the legal concept of armed conflict[37] but suggests that any armed conflict properly so called must have identifiable parties, take place in a particular geographical space, be distinguishable from unrelated acts of violence, have a defined start and finish, and involve hostilities of a certain minimal intensity.[38] After assessing these five criteria, he concludes that there does not exist an armed conflict between the United States and Al Qaeda, thus precluding the application of international humanitarian law.[39]

This conclusion, however, whether by Rona or other like-minded individuals, does not, and cannot, definitively settle the matter. To deal with each of Rona's five criteria in turn, for example, one could argue that: while Rona is undoubtedly correct that "'[t]error' or 'terrorism' cannot be a party to the conflict",[40] it could be said that Al Qaeda's history of intense and

33 Pejic, *supra* note 26, at 81.

34 *Ibid.,* 87-88, 90.

35 International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, *supra* note 29, at 233.

36 *See* Pejic, *supra* note 26, at 76; International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, *supra* note 29, at 231. Related questions follow if it can legally be said that an armed conflict exists between the United States and Al Qaeda, namely whether customary international humanitarian law applies and, if so, its content and application to particular facts and circumstances. For critical perspectives on recourse to customary international humanitarian law, *see* G. Rona, "Interesting Times for International Humanitarian Law: Challenges from the "War on Terror", 27(2) *Fletcher Forum World Aff.* 55, 68-69 (2003).

37 *Ibid*., 62-63, 74.

38 *Ibid.,* 60-63. *See also* International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, *supra* note 29, at 234-35.

39 *See* Rona, *supra* note 36, at 60-63.

40 *Ibid.,* 60. *See* Pejic, *supra* note 26, at 88 (stating that "'[t]errorism' is a phenomenon. Both practically and as a matter of law, war cannot be waged against a phenomenon");

frequent acts of violence and the concerted international effort, particularly in the Security Council, that has been directed at it has imposed upon it some degree of international status, thereby meaning that there are identifiable parties to a conflict;[41] the requirement that the conflict take place in a particular geographical space has yielded in an era in which a non-State actor such as Al Qaeda can pose a global threat and in which States open themselves to attacks on their own territory if they fail to act with due diligence as required by international law;[42] admittedly, disparate acts of violence by Al Qaeda across the world make the task of distinguishing the conflict from unrelated acts of violence a more taxing exercise, but this blurring along the edges should not lead one to ignore Al Qaeda's proud and public claims of responsibility after its violent engagements; Rona is correct to highlight difficulties related to the start and finish of an armed conflict with Al Qaeda,[43] but presumably, one could look at the first Al Qaeda-acknowledged attack or the first attack that could be attributed to the group and proceed from there; and finally, as to the last criterion, hostilities of a certain minimal intensity, the thousands of casualties, in dozens of countries but particularly in Afghanistan and Iraq, that have resulted from the engagement between the United States and Al Qaeda suggest the inappropriateness of a peacetime paradigm.

Furthermore, the argument that the mere failure of the United States to have formally derogated from its non-derogable obligations under international human rights law means that, *ipso facto*, an armed conflict, and a corresponding international humanitarian law framework, cannot be said to exist, as rapporteurs of the United Nations Human Rights Commission

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Dinstein, *supra* note 15, at 22 (asserting that "[t]he expression 'war on terrorism' by itself is a figure of speech or a metaphor").

41 *But see* Pejic, *supra* note 26, at 87 (stating that, "[w]hile all the terrorist acts that have occurred since September 11th have been labelled as being in some way 'linked' to al-Qaeda, very little about the exact nature of such a 'link' is ever provided, except that the suspects are usually Muslim men").

42 Dinstein alludes to this (*supra* note 15, at 20-21). On the due diligence obligation and non-State terrorist organisations, *see* R.P. Barnidge, Jr., "States' Due Diligence Obligations with Regard to International Non-State Terrorist Organisations Post-11 September 2001: The Heavy Burden That States Must Bear", 16 *Ir. Stud. Int'l Aff.* 103 (2005).

43 Taft discusses this in the context of detainees (*supra* note 3, at 153). Dinstein interprets the law of international armed conflict as allowing the detention of Al Qaeda unlawful combatants at Guantánamo Bay until the cessation of hostilities with that non-State actor, but he leaves unaddressed attendant dilemmas associated with the end of what he terms "hostilities in which Al Qaeda is involved". Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 50 (2004).

[UNHRC] seemed to imply in February 2006,[44] is equally problematic and unsustainable, preferring as it does form over substance.[45] While it is technically required that States issue official derogations under international human rights law, an armed conflict is an armed conflict, with or without a formal derogation, when the facts and circumstances suggest as much, and armed conflict necessarily triggers international humanitarian law. Bassiouni is correct to note, albeit in the context of torture, that semantics only go so far and that "a rose by any other name is still a rose".[46]

Unlike a judgment of, for example, the United States Supreme Court, which has an acknowledged authority as a legally binding and definitive interpretation of the law as applied to particular facts and circumstances under the municipal law of the United States, international law has yet to conclusively determine whether an armed conflict exists between the United States and Al Qaeda.[47] According to the ICRC, "there is no uniform answer",[48] as "international opinion – both governmental and expert, as well as public opinion – remains largely divided on how to deal with new forms of violence, primarily acts of transnational terrorism, in legal terms".[49]

Having said that, it should be noted that the present author's approach to the relationship between the United States and Al Qaeda is largely influenced by international humanitarian law, draws heavily on the insights and justifications of Taft and others with similar perspectives, and favours a description, however inartfully, of the relationship between the two actors, the United States and Al Qaeda, as a transnational international armed conflict.[50] The ICRC's concern that "[i]t is doubtful, absent further factual

44 *See* Situation of Detainees at Guantánamo Bay, *UN ESCOR*, at 36, UN Doc. Future E/CN.4/2006/120 (2006).

45 Wedgwood argues along comparable lines with regard to formal declarations of war (*supra* note 17, at 335).

46 M.C. Bassiouni, "Great Nations and Torture", in *The Torture Debate*, *supra* note 13, at 256, 259: "[t]he position of the United States is that torture called by another name is permissible and that torture which does not cause the risk of death is considered only coercive - ignoring the obvious conclusion that a rose by any other name is still a rose. In this case, torture by any other name is still torture".

47 Rona makes a similar point with regard to aggression (*supra* note 36, at 67).

48 International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, *supra* note 29, at 231.

49 *Ibid.,* 214.

50 The concept of a "transnational international armed conflict" seeks to convey by its use of "transnational" the armed conflict's cross-border nature and involvement of a non-State actor, Al Qaeda, and by its use of "international" the involvement of a State actor, the United States, as an opposing party in the conflict. On the interplay between the transnational and the international and the argument that an armed conflict paradigm applies, *see ibid.,* 231-32. For a theoretical discussion, *see* A. Roberts, "Righting Wrongs

evidence, whether the totality of the violence taking place between States and transnational networks can be deemed to be armed conflict in the legal sense"[51] should be acknowledged, but recent events, it is asserted, have provided the necessary "further factual evidence". At the same time, Neuman's point that all State uses of force against terrorists may not amount to armed conflict in the international humanitarian law sense[52] remains, in principle, valid and unassailable.

III. APPLYING INTERNATIONAL HUMAN RIGHTS LAW

Thus, while international law has yet to definitively settle the question whether an armed conflict exists between the United States and Al Qaeda, reasonable arguments being able to be made in favour of and against an armed conflict paradigm, this paper proceeds taking for granted the applicability of international humanitarian law. What role, if any, then, does international human rights law play in such a context?

The emerging consensus is that international human rights law continues to have legal effect, *mutatis mutandis*, during situations of armed conflict.[53] As the ICJ stated in the *Wall Advisory Opinion*, "the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights".[54] The ICJ went on in the same paragraph of that advisory opinion to say that the reality of armed conflict requires that, with respect to the *lex specialis derogat legis generalis* maxim, international human rights law be considered the *legis generalis* and international humanitarian law be treated as the *lex specialis*.[55] In late-2005, the ICJ, although failing to expressly mention the *lex specialis derogat legis generalis* rule, substantially reiterated this

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or Wronging Rights? The United States and Human Rights Post-September 11", 15(4) *E.J.I.L.* 721, 741, 746-48 (2004).

51 International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, *supra* note 29, at 234.

52 *See* Neuman, *supra* note 13, at 290-91.

53 *See* N. Lubell, "Challenges in Applying Human Rights Law to Armed Conflict", 87(860) *Int'l Rev. Red Cross* 737, 737-39 (2005). *See also* Dinstein, *supra* note 43, at 20-25.

54 Wall Advisory Opinion, *supra* note 16, at para. 106.

55 *Id. See also* H.-J. Heintze, "On the Relationship Between Human Rights Law Protection and International Humanitarian Law", 86(856) *Int'l Rev. Red Cross* 789, 793 (2004) (making a similar point by stating that "the law of peace and the law of war overlap but also that, when examining which duties are incumbent on a State in times of armed conflict, it is not possible to avoid taking international human rights law into consideration").

position in *Armed Activities on the Territory of the Congo*.[56] Rapporteurs of the UNHRC, after the ICJ had rendered its decisions in the *Wall* and *Congo* cases, described the relationship between the two regimes as "not mutually exclusive, but … complementary".[57] In this sense, the ICJ and these rapporteurs clearly reject the position to these two areas of law, a stance advanced by the United States, which would see them as hermetically sealed from one another.[58]

While clarity that the *lex specialis derogat legis generalis* rule applies in situations of armed conflict is helpful in allowing State and non-State actors to adjust their actions accordingly, it is the interaction between international humanitarian law and international human rights law on particular facts and circumstances that poses the most difficulties in practice.[59] Complexities arise, and there is a pressing need for practical guidance and precision. If one accepts, for example, Heintze's assertion that the trend is toward more "than mere complementarity and aims at providing the greatest effective protection of the human being through the cumulative application of both bodies of law"[60] and that the ICJ "regard[s] the *protection* granted by international humanitarian law and human rights law as a single unit and [appreciates a need] to harmonize the two sets of international rules",[61] serious, and crippling, questions still remain, such as the meaning of and standard against which "greatest effective protection" is to be interpreted and the nature of the mechanism through which harmonisation is to occur, this harmonisation presumably occurring without simultaneously undermining the integrity and effectiveness of international humanitarian law and international human rights law. Dinstein categorises international humanitarian law as containing rights that operate to the benefit of States and individuals, although he acknowledges that the provisions of this area of law are not always clear as to whether they benefit States or individuals,[62] and argues that international humanitarian law may provide greater protections to individuals in certain cases than international human rights law.[63] With this borne in mind, adjudicating on the basis of "greatest effective protection" is particularly problematic.

56 *See* Armed Activities on the Territory of the Congo (Congo v. Uganda), [2005] *I.C.J. Rep*., para. 216.
57 Situation of Detainees*, supra* note 44, at 10.
58 On the United States' position in this regard, *see* Heintze, *supra* note 55, at 789-93.
59 *See* Lubell, *supra* note 53, at 738.
60 Heintze, *supra* note 55, at 794.
61 *Ibid.,* 797.
62 *See* Dinstein, *supra* note 43, at 20-22.
63 *Ibid.,* 24-25.

The ICJ did little to resolve these complexities in noting that a particular legal question during armed conflict may involve international humanitarian law alone, international human rights law alone, or a combination of both areas of law.[64] It probably would have been unrealistic to have expected a more unambiguous, nuanced approach, however. The United States' fears expressed to the UNCHR in March 2006 that a legal perspective that would allow international human rights law to be considered during armed conflict would necessarily mean that captured enemy combatants would be entitled to the full panalopy of legal rights afforded criminal defendants under international human rights law[65] is an alarming and extreme interpretation that may be unwarranted, but at the same time, ICJ Judge Weeramantry's statement in his Dissenting Opinion in the 1996 *Legality of the Threat or Use of Nuclear Weapons* case that, "[i]ndeed, so well are human rights norms and standards ingrained today in global consciousness, that they flood through into every corner of humanitarian law"[66] provides little in the way of practical interpretative assistance. In this context, Lubell's encouragement of sensitivity to the distinct legal languages of international humanitarian law and international human rights law as a way to negotiate impasses that may arise may be a useful and promising approach.[67]

That having been said, the Security Council has clearly stressed a role for international human rights law in its Resolutions related to terrorism. In an annexed declaration in January 2003, for example, it expressly stated that "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law".[68] In its Resolution dealing with incitement of terrorism, which was adopted in September 2005, the Security Council again stressed the necessity of States' compliance with "all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law".[69]

The Security Council has been far from alone within the United Nations system in emphasising the necessary role of human rights in counterterrorism, as this focus has been the thrust of the United Nations

64 *See* Wall Advisory Opinion, *supra* note 16, at para. 106.
65 *See* Reply, *supra* note 20, at 752.
66 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35(4) *I.L.M.* 809, 901 (1996) (Weeramantry J., dissenting).
67 *See* Lubell, *supra* note 53, at 744-46.
68 S.C. Res. 1456, *UN SCOR*, Annex, at 3, UN Doc. S/RES/1456 (2003).
69 S.C. Res. 1624, *UN SCOR*, at 3, UN Doc. S/RES/1624 (2005).

generally.[70] The General Assembly, for example, has used language similar to that used by the Security Council in highlighting human rights. In a Resolution adopted in December 2002, it affirmed that "States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law".[71] The General Assembly used virtually identical language in adopting the 2005 World Summit Outcome.[72]

United Nations Secretary-General Kofi Annan has also made similar arguments. To consider but one of his remarks on the subject, Annan stressed at the International Summit on Democracy, Terrorism, and Security in Madrid in March 2005 that "human rights and the rule of law must always be respected … [and that u]pholding human rights is not merely compatible with [a] successful counter-terrorism strategy. It is an essential element".[73] Annan would likely have agreed with the holistic strategy advocated by Sri Lankan President Chandrika Bandaranaike Kumaratunga in her address at the 2005 World Summit.[74]

The activities of the United Nations treaty bodies related to human rights, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, the Inter-American Commission on Human Rights, and the Inter-American Court on Human Rights [IACtHR] also evidence a human rights imperative.[75] For example, the IACtHR's jurisprudence recognises the unquestionable right of States to security but says that the means to be used are necessarily limited by legal and moral considerations.[76]

70 *See* A.P. Schmid, "Terrorism and Human Rights: A Perspective from the United Nations", 17(1-2) *Terrorism & Pol. Violence* 25, 29 (2005); Situation of Detainees, *supra* note 44, at 7.

71 G.A. Res. 57/219, *UN GAOR*, at 2, UN Doc. A/RES/57/219 (2002).

72 G.A. Res. 60/1, *UN GAOR*, at 22, UN Doc. A/RES/60/1 (2005).

73 K. Annan, "A Global Strategy for Fighting Terrorism: Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism, and Security" (10 Mar. 2005), *available at:* http://www.un.org/apps/sg/printsgstats.asp?nid=1345.

74 *See* C. Bandaranaike Kumaratunga, "Address by Her Excellency Chandrika Bandaranaike Kumaratunga, President of the Democratic Socialist Republic of Sri Lanka, at the High-Level Plenary Meeting of the General Assembly of the United Nations" 5 (15 Sept. 2005), *available at:* http://www.un.org/webcast/summit2005/statements15/sri05091515eng.pdf (stating that, "[i]f we are to fight global terrorism, poverty and disease, we must take an integrated approach to security, human rights and development, both nationally and internationally").

75 *See* Office of the United Nations High Commissioner for Human Rights, *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights While Countering Terrorism*, UN Sales No. HR/PUB/03/1 (2003).

76 *See* Velásquez Rodríguez, [1988] *Inter-Am. Ct. Hum. Rts*. (Ser. C), No. 4, para. 154.

IV. MARKETING HUMAN RIGHTS TO STATES FIGHTING TERRORISM

While international law does not permit States to blind themselves to human rights when confronting terrorist threats from non-State actors, reality demonstrates that they often subject international legal considerations to a calculus that favours expediency and stability during times of crisis.[77] Ewing, for example, decries the lack of judicial activism in defence of individual human rights, both historically and specifically since the Human Rights Act 1998, when national security concerns have been raised in the United Kingdom.[78] States often ignore, if not purposely and disdainfully reject, what they perceive to be the legal platitudes of external actors in such situations. This is perhaps especially the case given that international human rights law imposes obligations upon States that it does not, and cannot, impose upon non-State terrorist organisations.[79]

State practice with regard to counterterrorism and human rights, as Annan has recently stated, supports this submission of human rights.[80] The Office of the United Nations High Commissioner for Refugees has expressed its

77 *See* Roberts, *supra* note 50, at 730-35. On this since 11 September, with particular emphasis on the United States, *see* M.C. Bassiouni, "The Regression of the Rule of Law Under the Guise of Combating Terrorism", 76(1-2) *Rev. Int'l Droit Pénal* 17 (2005). According to Bassiouni, "[i]t is truly extraordinary to have witnessed in a relatively short period of three years, and as a result of an incident that pales in comparison to the many tragedies the world has suffered over the last half century, the transformation of the international rule of law and human rights into a trend of repressiveness and regression from the rule of law". *Ibid.,* 24.

78 *See* K.D. Ewing, "The Futility of the Human Rights Act", *Pub. L.* 829 (Winter 2004). He describes the post-11 September era as "in effect the sixth cycle of restraint". *Ibid.,* 851.

79 On this disparity in obligations, *see* J. Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights", 14(2) *E.J.I.L.* 241, 243 (2003).

80 According to him, "international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently adopting to counter terrorism infringe on human rights and fundamental freedoms"; Annan, *supra* note 73. Also of relevance are R. Goldstone, "The Tension Between Combating Terrorism and Protecting Civil Liberties", in *Human Rights in the "War on Terror"* 157, 165-66 (R.A. Wilson ed., 2005) (making Annan's point with reference to the United States, the United Kingdom, India, South Africa, Zimbabwe, Liberia, and Indonesia); M. Robinson, "Connecting Human Rights, Human Development, and Human Security", in *Human Rights, ibid.*, 308, 310 (noting a "subtle - or not so subtle - change of emphasis in many parts of the world: order and security have become priorities that trump all other concerns"); Protecting Human Rights and Fundamental Freedoms While Countering Terrorism: Report of the Secretary-General, *UN GAOR*, at 8, UN Doc. A/60/374 (2005); Promotion and Protection of Human Rights: Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Report of the High Commissioner for Human Rights, *UN ESCOR*, at 6, UN Doc. E/CN.4/2005/100 (2004). The disparity

the United Nations High Commissioner for Refugees has expressed its concern at the possible victimisation of asylum seekers and has argued that counterterrorism efforts may jeopardise the prohibition on *refoulement* and the basic right to seek asylum.[81] Similar fears have been raised about human rights generally by the Office of the United Nations High Commissioner for Human Rights [OHCHR][82] and the then UNHRC.[83] High Commissioner for Human Rights Louise Arbour, who heads the OHCHR, recently referred to some counterterrorism tactics as forming part of a "vicious circle of illegality".[84] Judge Higgins of the ICJ, referring to the 1966 International Covenant on Civil and Political Rights [ICCPR] and the 1966 International Covenant on Economic, Social, and Cultural Rights [ICESCR], should be commended for her candour in noting that "many, many States are not in compliance with their obligations under the two Covenants".[85]

Amnesty International and Human Rights Watch have also documented this State practice.[86] Bassiouni describes what he perceives to be the new reality, a "no-man's land approach where law and due process of law

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between human rights rhetoric and action is common to human rights generally. *See* V.S. Mani, "Centrifugal and Centripetal Tendencies in the International System: Some Reflections", in *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* 241, 251 (R. St. J. Macdonald & D.M. Johnston eds., 2005).

81 *See* Letter Dated 3 Feb. 2005 from the Chairman of the Security Council Committee Established Pursuant to Res. 1373 (2001) Concerning Counter-Terrorism Addressed to the President of the Security Council, *UN SCOR*, Annex, at 94, UN Doc. S/2005/87 (2005).

82 *See ibid.,* Annex, at 95; R. Mani, "The Root Causes of Terrorism and Conflict Prevention", in *Terrorism and the UN: Before and After September 11* 219, 233 (J. Boulden & T.G. Weiss eds., 2004).

83 *See* Mani, *supra* note 82, at 233.

84 Address by Louise Arbour, UN High Commissioner for Human Rights at Chatham House and the British Institute of International and Comparative Law (16 Feb. 2006), *available at:* http://www.unhchr.ch/huricane/huricane.nsf/view01/E60AF3995B87D7EDC1257117005711E8?opendocument.

85 Wall Advisory Opinion, *supra* note 16, at para. 27 (Higgins J., Separate Opinion).

86 *See* I. Khan, *Amnesty International,* Foreword, *available at:* http://web.amnesty.org/web/web.nsf/print/4C6D9C974BE73CA880256FE7005A49C7 (last visited 22 Jan. 2006) (stating that, "[f]rom Israel to Uzbekistan, Egypt to Nepal, governments have openly defied human rights and international humanitarian law in the name of national security and 'counter-terrorism'"); Human Rights Watch, *Human Rights Watch World Report 2006: U.S. Policy of Abuse Undermines Rights Worldwide,* 18 Jan. 2006, *available at:* http://hrw.org/english/docs/2006/01/13/global12428_txt.htm.

guaranteed by judicial scrutiny have become marginally relevant",[87] and implies that this may tend toward dictatorship.[88]

The United Nations, to its credit, has recognised this reality, although it has also been criticised for a bias towards human rights over security in cases of terrorist attacks by non-State actors.[89] It has responded by framing the human rights debate so that States can perceive human rights to be in their best interest when countering terrorism. Far from being mere legal niceties, according to the United Nations, human rights play an essential role in the effective combating of terrorism.[90]

To give some examples, Annan has argued that States that compromise human rights actually help terrorists.[91] The OHCHR has stressed that State fidelity to human rights when fighting terrorism means that "terrorism can be effectively countered without infringing on fundamental freedoms".[92] According to Arbour, "respect for human rights is – not an obstacle – but rather an essential element in effective counter-terrorism strategies".[93] Mary Robinson and Sergio Vieire de Mello, two of Arbour's predecessors, also made such arguments,[94] as did Annan in his 2006 *Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy:*

87 Bassiouni, *supra* note 77, at 21.

88 *Ibid.,* 24. He also notes that "[t]he disparity between proclamations of adherence to the international rule of law, due process and human rights, and the actions of certain governments is widening"; *ibid.,* 25.

89 *See* G.M. Steinberg, "The UN, the ICJ and the Separation Barrier: War by Other Means", 38(1-2) *Israel L. Rev*. 331, 337 (2005) (stating that, "[w]hen terror attacks are conducted or supported by non-state actors, and the defensive response of the state under attack encroaches on civil liberties and human rights, the existing international legal framework is more likely to condemn the defensive actions than the perpetrators of the violence, particularly given the anti-state bias that permeates post-modern ideology").

90 *See* E.J. Flynn, "Counter-Terrorism and Human Rights: The View from the United Nations", 1 *Eur. Hum. Rts. L. Rev*. 29, 30 (2005).

91 *See* Annan, *supra* note 73 (stating that "compromising human rights … facilitates achievement of the terrorist's objective – by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits").

92 *Digest of Jurisprudence*, *supra* note 75, at 1.

93 Letter Dated 3 Feb. 2005, *supra* note 81, Annex, at 95. *See* L. Arbour, "Security Under the Rule of Law, Address of Louise Arbour UN High Commissioner for Human Rights to the Biennial Conference of the International Commission of Jurists" (Berlin) (27 Aug. 2004), *available at:* http://www.unhchr.ch/huricane/huricane.nsf/view01/3485B28EDDA173F0C1256EFD0035373C?opendocument.

94 *See* Flynn, *supra* note 90, at 49.

Report of the Secretary-General (*Uniting Against Terrorism*).[95] Higgins has referred to States' fidelity to the related field of international humanitarian law as "the price of our hopes for the future".[96]

Outside the United Nations, the Council of Europe (CE) has argued that satisfying human rights law while fighting terrorism is both "possible … [and] absolutely necessary".[97] CE Secretary-General Terry Davis asserted in March 2005 that States need not fear that the effectiveness of counterterrorism will be compromised by incorporating human rights because "the need to respect human rights is not an obstacle to the effective fight against terrorism".[98]

President of the Supreme Court of Israel Aharon Barak, Irish Minister for Foreign Affairs Dermot Ahern, and India's National Human Rights Commission have also argued that upholding human rights while countering terrorism serves a crucial instrumental value.[99] In agreement with this are many scholars, such as Gearty.[100] Non-governmental organisations have also generally "maintained … that there is in reality no goal conflict between

[95] Uniting Against Terrorism: Recommendations for a Global Counter-Terrorism Strategy: Report of the Secretary-General, *UN GAOR*, at 2, UN Doc. A/60/825 (2006) (arguing that "[e]ffective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing ones. Accordingly, the defence of human rights is essential to the fulfilment of all aspects of a counter-terrorism strategy").

[96] Wall Advisory Opinion, *supra* note 16, at para. 14 (Higgins J., Separate Opinion).

[97] Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism,* adopted 11 July 2002, in Council of Europe, *Human Rights and the Fight Against Terrorism: The Council of Europe Guidelines* 7, 7, Preamble (d) (2005). On this, *see* C.A. Gearty, "Terrorism and Human Rights"*,* 1 *Eur. Hum. Rts. L. Rev.* 1, 4 (2005).

[98] T. Davis, "Preface", in *Guidelines*, *supra* note 97, at 5, 5.

[99] *See* A. Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy"*,* 116(1) *Harv. L. Rev.* 16, 148 (2002) (citing H.C. 5100/94, Public Committee Against Torture in Israel v. Government of Israel, 53(4) *P.D*. 817, 845, stating that, "[s]ometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand"). *See also* D. Ahern, "Address by the Minister for Foreign Affairs to the Royal Irish Academy Marking 50 Years of UN Participation" (18 Nov. 2005), *available at:* http://foreignaffairs.gov.ie/Press_Releases/20051118/1915.htm (asserting that the "violation of such norms is not only wrong in itself but it is also counterproductive as it can be used to justify further atrocities"); V. Vijayakumar, "Legal and Institutional Responses to Terrorism in India", in *Global Anti-Terrorism Law and Policy* 351, 356 (V.V. Ramraj *et al*. eds., 2005).

[100] *See* Gearty, *supra* note 97, at 6 (asserting that, without an "overarching human rights dimension, counterterrorism law is not only immoral and subversive of the values which it purports to defend, but it is also certain to fail").

security and human rights – even that human rights fulfil a considerable instrumental function with respect to freedom from terrorism".[101]

To assert, as Annan does in *Uniting Against Terrorism*, that "in the fight against terrorism, we must never sacrifice our values and lower our standards to those of the terrorists"[102] presumes both that international standards are sufficient to effectively fight terrorism and that, even if they are not, "our values and … standards" must not yield. Whether a State can simultaneously ensure human rights for all of those within its jurisdiction and provide effective security from terrorism, however, remains an open question.

To that end, the following section explores whether human rights observance is necessary, in an empirical sense, to effectively fight terrorism. Essentially, this involves evaluating whether what Posner concludes about international humanitarian law, that "[t]he laws may make war more humane by depriving soldiers of destructive weapons and tactics; but they may make war less humane by prolonging it, and they may make the world less secure by making war more attractive",[103] extends to international human rights law in the context of non-State terrorism.

V. IS HUMAN RIGHTS OBSERVANCE NECESSARY TO EFFECTIVELY FIGHT TERRORISM?

History is replete with examples of States that have effectively destroyed their political opposition through an overwhelming show of force that has relegated human rights to, at best, a matter of secondary importance.[104]

[101] Dunér, *supra* note 2, at 97. *See* Roberts, *supra* note 50, at 738 (asserting that "[h]uman rights NGOs often argue that trade-offs between human rights and national security will result in more rather than less terrorism and that terrorism can be effectively countered without restricting human rights").

[102] Uniting Against Terrorism, *supra* note 95, at 22.

[103] Posner, *supra* note 6, at 427. *See* T. Sowell, "Pacifists Versus Peace", *Jewish World Rev.*, 21 July 2006, *available at:* http://jewishworldreview.com/cols/sowell072106.asp.
According to Lindley-French, "[t]he Israeli military was put in an untenable position: It was not permitted to take risks with its personnel, and it had the wrong equipment, training and way of doing things to win such a conflict. Consequently, Israel could only attack Hezbollah indirectly, increasing the risk to Lebanese civilians and decreasing any chance of success"; J. Lindley-French, "The Use of Force: Western Military Power Is in Crisis", *Int'l Herald Trib.*, 26-27 Aug. 2006, at 4.

[104] *See* A.M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* 105-30 (2002); Goldstone, *supra* note 80, at 161 (stating that "oppressive societies which, by definition, do not respect the civil rights of their citizens … have all the machinery they might need to put down attacks from within and outside their borders"). Lindley-French, adopting a realist perspective, rhetorically asks "[w]hy … the

While some of these State responses have amounted to State terrorism, this has not always been the case. As the following historical examples suggest, States that prioritise military success over individual human rights in confronting dissident elements frequently achieve their objectives.

To give an example, the United States, preferring a swift end to the Second World War, got it when the Enola Gay emptied its atomic payload on Hiroshima and when Nagasaki was hit soon thereafter. Although there is continuing debate on the subject, a strong case can be made that the nuclear bombings of Hiroshima and Nagasaki, while obviously killing and maiming tens of thousands of Japanese people, civilians included, avoided what would have been an even larger bloodbath had Allied forces had to invade Japan as they did at Normandy.[105] Hiroshima and Nagasaki demonstrate that overwhelming force can bring a State's enemies to their knees.

States need not necessarily observe human rights, at least not completely, to effectively fight terrorism and maintain their control. There is also evidence to the contrary, to the effect that "a little repression increases instability whereas a great deal of it has the opposite effect".[106] Essentially, these latter types of regimes are those which Feinstein and Slaughter refer to as those which are governed by "rulers whose power over their own people and territory is so absolute that no matter how brutal, aggressive, or irrational they become, no force within their own society can stop them".[107]

Contrasting the experiences of Czechoslovakia, Albania, and Algeria with those of Spain, Italy, and West Germany on the question of human rights and the incidence of terrorism, for example, supports this.[108] Furthermore, the lack of significant non-State terrorism in China, Cuba, North Korea, and the communist States of the former Soviet Union and central and eastern Europe can be contrasted with experiences in

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best armies in the world [are] in difficulty against adversaries that 19th-century colonial officers would have defeated[.] … Israel has been much criticized for using excessive force in trying to defeat Hezbollah. In fact, military logic would have suggested not only a far more ruthless use of military force to defeat such an enemy, but a very different use. Israel had the power, but used it in the wrong way. … Western military power must be sharper at the point of contact with the likes of the Taliban and Hezbollah, and yet deeper if it is thereafter to create the security space in which peace can truly be established"; *supra* note 103, at 4.

105 *See* Posner, *supra* note 6, at 426.

106 H.B. Mishra, *Terrorism: Threat to Peace and Harmony* 27 (1999); *ibid.,* 31 (stating that, "[w]herever the means of repression have been most complete and perfected, there has been no terrorism at all. These facts are not in dispute, but there is psychological resistance to accepting the obvious. Seldom has it been admitted that virtue in politics is not always rewarded").

107 L. Feinstein & A.-M. Slaughter, "A Duty to Prevent", 83(1) *Foreign Aff.* 136, 143 (2004).

108 *See* Mishra, *supra* note 106, at 44.

democracies, defining democracies broadly, such as Greece, Argentina, Canada, the United States, the United Kingdom, Turkey, Mexico, the Philippines, Israel, India, France, Japan, Italy, Russia, Spain, Indonesia, and Sri Lanka.[109] In this sense, Falk's contention that "there is no evidence to support the claim that the abridgement of human rights and the abuse of detainees and suspects enhances security"[110] is misleading because it is empirically contradictory.

It is useful here to refer to the ICJ's recent jurisprudence, particularly the *Wall Advisory Opinion*. That case was decided in the context of the Second Intifada and a seemingly intractable level of violence between Israelis and Palestinians that, by the admission of Fatah's Ziyad Abu´Ein, was in part facilitated by the Oslo Accords.[111] Israeli historian Benny Morris expressed the frustration and anger of many of his compatriots in stating about the Palestinians, "something like a cage has to be built for them. I know that sounds terrible. It is really cruel. But there is no choice. There is a wild animal there that has to be locked up in one way or another".[112]

In the *Wall Advisory Opinion*, the ICJ considered public international law in its broadest sense.[113] In particular, it regarded as binding law the Hague Regulations,[114] the 1949 Fourth Geneva Convention,[115] the ICCPR,[116] the ICESCR,[117] and the 1989 Convention on the Rights of the Child.[118]

[109] *See* Dunér, *supra* note 2, at 91-92.

[110] R. Falk, "Human Rights: A Descending Spiral", in *Human Rights*, *supra* note 80, at 225, 236.

[111] According to Abu´Ein, "there would have been no resistance in Palestine if not for Oslo. It was Oslo that strongly embraced the Palestinian resistance. All the occupied territories – and I was one of the activists in the first and second Intifadas, and I was arrested by Israel several times[.] … If not for Oslo, there would have been no resistance. Throughout the occupied territories, we could not move a single pistol from one place to another. If not for Oslo, the weapons we got through Oslo, and if not for the 'A' areas of the Palestinian Authority, if not for the training, the camps, the protection provided by Oslo, and if not for the release of thousands of Palestinian prisoners through Oslo – this Palestinian resistance could not have carried out this great Palestinian Intifada, with which we confronted the Israeli occupation". Interview on Al-Alam TV with Ziyad Abu´Ein, "If Not for the Oslo Accords, There Would Have Been No Intifada", MEMRI, 4 July 2006, *available at* http://www.memritv.org/Transcript.asp?P1=1205.

[112] A. Shavit, "Survival of the Fittest", *Haaretz*, *available at:* http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=380984 (last updated 1 Sept. 2004).

[113] *See* Wall Advisory Opinion, *supra* note 16, at para. 86.

[114] *Ibid.,* para. 89.

[115] *Ibid.,* para. 101.

[116] *Ibid.,* para. 111.

[117] *Ibid.,* para. 112.

[118] *Ibid.,* para. 113.

In concluding that the separation barrier was "contrary to international law",[119] the ICJ cited "substantial restrictions on … freedom of movement[,] … serious repercussions for agricultural production [and] … increasing difficulties for the population concerned regarding access to health services, educational establishments and primary sources of water".[120] The ICJ was clear in its condemnation, expressly declaring Israel's actions with regard to it to be "breaches … of various of its obligations under the applicable international humanitarian law and human rights instruments".[121]

Given that international actors have, as referred to above, asserted a necessarily symbiotic relationship between human rights and effective counterterrorism, one might naturally be led to believe that the separation barrier has been no more effective in frustrating terrorism than a sieve is in preventing an inevitable breach and torrent of water. One might be particularly led to believe this given Palestine's assertion in its written statement to the ICJ in the *Wall Advisory Opinion* that Israel's motives were actually nothing more than "bald assertions of its security interest".[122] The evidence suggests, however, that what the ICJ essentially regarded as a human rights monstrosity has been effective in combating terrorism.

Israel argues that the separation barrier is an integral part of its counterterrorism strategy, that it is a "temporary and non-violent measure to counter a murderous threat directed at the softest of targets"[123] and that it "enable[s] it effectively to combat terrorist attacks launched from the West Bank".[124] In its written statement to the ICJ in the *Wall Advisory Opinion*, Israel cited fewer attacks, although acknowledging that the number of attempts remained consistent at approximately fifty each week, and credited the separation barrier as being "a significant factor in this respect".[125]

[119] *Ibid.,* para. 142.
[120] *Ibid.,* para. 133.
[121] *Ibid.,* paras. 137, 134.
[122] Written Statement Submitted by Palestine, Wall Advisory Opinion, *supra* note 16, at para. 460.
[123] Written Statement of the Government of Israel on Jurisdiction and Propriety, Wall Advisory Opinion, *supra* note 16, at para. 3.74.
[124] Wall Advisory Opinion, *supra* note 16, at para. 116. For critical positions on this justification, *see* Palestinian Centre for Human Rights, Securing the Wall from International Law: An Initial Response to the Israeli State Authority 6-7, *available at:* http://www.pchrgaza.org/Interventions/Securing%20the%20Wall.pdf (2005); Bimkom & B'Tselem, Under the Guise of Security: Routing the Separation Barrier to Enable the Expansion of Israeli Settlements in the West Bank 9-18, *available at:* http://www.btselem.org/Download/200512_Under_the_Guise_of_Security_eng.pdf (2005).
[125] Written Statement of the Government of Israel, *supra* note 123, at para. 3.66. "Statistical data indicates a *30% drop in the number of terrorist attacks* that took place in 2003

Comparing an area in the West Bank with the separation barrier with one without it also supports this conclusion.[126] Higgins, in her Separate Opinion, also acknowledged the effectiveness of the separation barrier, stating that it "does seem to have resulted in a diminution on attacks on Israeli civilians".[127] The separation barrier between Israel and Gaza, furthermore, has shown its effectiveness: no Palestinian suicide bombers have crossed into Israel from Gaza because of it.[128]

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compared to 2002. Similarly, there has been a 50% decrease in the number of victims murdered by terrorists in 2003 compared to the previous year". Israel Ministry of Foreign Affairs, *Saving Lives: Israel's Anti-Terrorist Fence - Answers to Questions*, *available at* http://www.mfa.gov.il/mfa/mfaarchive/2000_2009/2003/11/saving%20lives-%20israel-s%20anti-terrorist%20fence%20-%20answ (1 Jan. 2004). *See* Israel Ministry of Foreign Affairs, *2005 Terrorism Review*, *available at:* http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/2005+Terrorism+Review.htm (2 Jan. 2006) (stating that, "during the 34 months of confrontation (beginning on 29 September 2000) up until the establishment of the security fence in July 2003, operational infrastructures in Samaria perpetrated 73 deadly large-scale terrorist attacks (suicide attacks and/or car bombs) inside Israel, in which 293 Israelis were murdered and 1,950 were wounded. In the 28 months following August 2003 and up to December 2005, they succeeded in perpetrating 11 such attacks inside Israel, in which 54 Israelis were murdered and 358 were wounded"). According to Krauthammer, "[t]he success of this fence plus unilateral-withdrawal strategy is easily seen in the collapse of the intifada. Palestinian terror attacks are down 90 percent". C. Krauthammer, "The Legacy of Ariel Sharon: What's Ahead for the State of Israel?: Sharon Put Israel on a Strategic Path out of the Wreckage of the Post-Oslo World", *Chi. Trib.*, 9 Jan. 2006, § 1, at 17. *See* T. Kafala & M. Asser, "Analysis: Palestinian Suicide Attacks", BBC News, *available at:* http://news.bbc.co.uk/2/hi/middle_east/3256858.stm (last updated 17 Apr. 2006) (stating that "[t]he number of attacks fell as Israel besieged Palestinian towns and pressed ahead with its barrier in and around the occupied West Bank."); I. Manji, "How I Learned to Love the Wall", *N.Y. Times*, 18 Mar. 2006, §A, at 15 (noting that, "[s]ince the barrier went up, suicide attacks have plunged, which means innocent Arab lives have been spared along with Jewish ones").

126 *See* Israel Ministry of Foreign Affairs, *Israel's Anti-Terrorist Fence: The Anti-Terrorist Fence – An Overview*, *available at:* http://securityfence.mfa.gov.il/mfm/Data/48152.doc (last visited 27 Nov. 2005). For similar evidence, *see* Ministry of Defence, *Israel's Security Fence: Questions and Answers*, *available at:* http://www.securityfence.mod.gov.il/Pages/ENG/questions.htm (last updated 22 Feb. 2004) (stating that "[t]he first stage of the Security Fence (from Salem to Elkana) which has been operational since July 2003, is already proving itself as an effective defensive deterrent which prevents the repeated attempts to enter Israel and carry out terror attacks").

127 Wall Advisory Opinion, *supra* note 16, at para. 35 (Higgins J., Separate Opinion).

128 *See* Israel Ministry of Foreign Affairs, *Israel's Anti-Terrorist Fence, supra* note 126. Israel has also cited a less categorical statistic, *see* Ministry of Defence, *Israel's Security*

Gearty usefully notes that the apologists of counterterrorism and those who prioritise human rights couch their agendas in moral terms.[129] Who is to judge which morality should be given greater weight? States have shown themselves quite capable of carpet bombing their opposition into submission with sufficient political will and when committed to using "both … [their] hands, … fingernails, … teeth, and … feet, without following the Marquess of Queensberry rules".[130] This suggests that human rights observance may not be necessary, at least not always, to effectively fight terrorism.

VI. ASSESSMENT

It should be reiterated at this point that international law does not permit States to blind themselves to human rights when fighting terrorism. States that do so, particularly when they do so egregiously, violate international law. The substance of international law may or may not be reasonable, but that human rights considerations must be taken on board should be acknowledged as part of the *lex lata*.

That there may sometimes be a trade-off between the effective fighting of terrorism and individual human rights should not necessarily come as a surprise because the law is rife with conflicts of norms and competing objectives.[131] In the context of self-determination, for example, Klabbers recognises "the law's inability to decide whether the right of self-

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Fence, supra note 126 (stating that "the security fence between Israel and the Gaza Strip that has existed since 1996 has proven its effectiveness and [that] the vast majority of terrorist attempts have been discovered and thwarted"), but the point is still convincingly made.

[129] *See* Gearty, *supra* note 97, at 1. *See also* Fitzpatrick, *supra* note 79, at 246 (describing this as a "clash of moral absolutes").

[130] Dershowitz, *supra* note 104, at 3. According to Ethiopian Emperor Haile Sellassie I, Italy's mustard gassing of Ethiopia just prior to the Second World War achieved its objective of domination and conquest, but the means used were immoral. *See* Haile Sellassie I, *My Life and Ethiopia's Progress: Volume One: 1892-1937: The Autobiography of Emperor Haile Sellassie I: King of Kings and Lord of Lords* 263 (E. Ullendorff trans., 2003) (stating that, "[a]lthough they may destroy the Ethiopian army with this instrument of poison, yet when it is reported in future history that they wiped out with poison a defenceless people, it is not to be doubted that this will forever be a burden of shame and humiliation for Fascist Italy"). For a disturbing description, *see ibid.,* 263-64.

[131] For an illuminating interview with Lord Chancellor Charles Falconer in which he discusses trade-offs between individuals human rights and public safety, *see* Human Rights, BBC Sunday AM, BBC News, *available at:* http://news.bbc.co.uk/2/hi/programmes/how_euro_are_you/4769979.stm (last updated 14 May 2006).

determination of group X should result in the breakup of state Y and whether it should possibly override competing claims from groups residing on territory where X happens to be in the majority (Serbs in Bosnia, for instance)".[132]

State practice demonstrates that States use a balancing test when negotiating between the sometimes conflicting norms of national security and human rights.[133] This is particularly necessary in the United States, where Al Qaeda has historically benefited from divisions of governmental authority in a federal republic and privacy rights.[134] Freedoms in the globalised era, such as the freedom of movement, open opportunities and benefit those who choose to abuse seemingly benign rights.[135] As Wedgwood argues, "[i]n its adaptive style of warfare, Al-Qaeda is willing to use the scientific fruits of a free society and harness them, in a dangerous syncretism, to the purposes of destruction".[136]

Given that State practice forms one of the two components of customary international law and that customary international law divorced from State practice is unsustainable, it might be supposed that the reality of widespread human rights abuses by States in the context of counterterrorism would inform an evolution of the law related to national security and human rights in situations of terrorism to the "benefit" of the former.[137] Higgins, however, addressing the issue of torture and acknowledging that more States than not engage in it, argues that customary international law continues to so clearly prohibit torture "because *opinio juris* as to its normative status continues to exist. No state, not even a state that tortures, believes that the international law prohibition is undesirable and that it is not bound by the prohibition".[138]

[132] J. Klabbers, "The Right to Be Taken Seriously: Self-Determination in International Law", 28(1) *Hum. Rts. Q.* 186, 199 (2006).

[133] The fact that States negotiate at all between these sometimes conflicting norms suggests that the necessarily symbiotic relationship between them that international law posits, at least in the sense of utility, may be exaggerated.

[134] *See* R. Wedgwood, "Countering Catastrophic Terrorism: An American View", in *Enforcing International Law Norms Against Terrorism* 103, 103-04 (A. Bianchi ed., 2004).

[135] *Ibid.,* 104-105.

[136] *Id.*

[137] On the evolutionary nature of customary international law, *see* A. D'Amato, "Trashing Customary International Law", 81 *A.J.I.L.* 101, 104 (1987) (stating that "[c]ustomary rules … are not static. They change in content depending upon the amplitude of new vectors (state interests). … [T]he customary rules that survive the legal evolutionary process are those that are best adapted to serve the mutual self-interest of all states").

[138] R. Higgins, "Sources of International Law: Provenance and Problems", in *Problems and Process: International Law and How We Use It* 17, 22 (1994). *See* Roberts, *supra* note 50, at 737 (asserting in the context of human rights generally responses that resemble

This question of belief by States is absolutely essential because, as D'Amato notes, without ascertaining it, international legal analysis "would amount, to the extent of its deviation from actual belief, only to a natural-law prescription of what states ought to believe".[139]

The ICJ's jurisprudence provides some practical guidelines for assessing customary international law. In *Military and Paramilitary Activities in and Against Nicaragua*, for example, it stated that State practice with regard to a particular customary international law norm, in that case, the prohibition on the use of force and the non-intervention rule, does not have to be "perfect",[140] nor "in absolutely rigorous conformity with the rule".[141] Indeed, the ICJ went on to say that contrary State practice could be "not infrequent".[142]

Despite the fact that State practice does not have to unyieldingly conform to a particular customary international law norm, Higgins' view for a number of reasons seems to be too confident in its insistence that dispositive and conclusive support for a customary international law prohibition on torture can be found in what she presumably refers to, declarations by State representatives in multilateral fora.[143] First, it necessarily downplays, by not addressing, Anderson's argument that "it is not clear whether a statement, the same statement, can be both State practice and *opinio juris*".[144] Second, Higgins' view overlooks Roberts' point that States generally since 11 September have turned a blind eye to human rights abuses and even publicly

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Higgins', namely "(a) while some states violate human rights some of the time, most states respect human rights most of the time; (b) even when states breach human rights standards, they often deny these breaches rather than endorsing them as official policy; and (c) human rights violations are often met with protest from other states, so they represent breaches of existing law rather than the beginnings of a new or modified law").

139 A. D'Amato, "On Consensus", 8 *Can. Y.B. Int'l L.* 104, 105 (1970).

140 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), [1986] *I.C.J. Rep*. 14, 98.

141 *Id.*

142 *Ibid.,* 106.

143 "Both physical and verbal acts of States constitute practice that contributes to the creation of customary international law"; *Customary International Humanitarian Law*: *Volume 1: Rules* XXXII (ICRC, J.-M. Henckaerts & L. Doswald-Beck eds., 2005).

144 S. Anderson, "When the Law Breaker Becomes the Law Maker", in *The Challenge of Conflict: International Law Responds* 413, 428 (U. Dolgopol & J. Gardam eds., 2006). *See ibid.,* 415 (maintaining that "how one goes about determining whether *opinio juris* is present is not altogether clear"). As Koskenniemi insightfully notes, "[t]here are no independently applicable criteria for ascertaining the presence of the *opinio juris*[, and] … [c]ustomary law doctrine remains indeterminate because it is circular". M. Koskenniemi, "The Politics of International Law", 1(1-2) *E.J.I.L.* 4, 26 (1990); *see ibid*., 25-27.

declared a bias in favour of national security over human rights.[145] Higgins' view also does not speak to D'Amato's critique that relying on United Nations Resolutions as evidence of *opinio juris* results in the hollowing out of State practice and the creation of self-fulfilling rules: "All we need is the original alleged rule and the empty theory that any practice inconsistent with it does not count".[146] As ICJ Judge Schwebel stated in his Dissenting Opinion in the *Nuclear Weapons Advisory Opinion*, "[i]f a [General Assembly] resolution purports to be declaratory of international law, if it is adopted unanimously (or virtually so, qualitatively as well as quantitively) or by consensus, and *if it corresponds to State practice*, it may be declaratory of international law".[147] To suggest that mere words as to legal obligation on torture speak louder than an international State practice that too often reflects an on-the-ground reality of State recourse to torture in its various grisly guises, furthermore, implies that international law can, and should, take refuge in the insincere platitudes of States that publicly insist by their words that international law prohibits torture but who by their actions and omissions suggest that they do not really believe that it does. Arguably, it is more reasonable to concede that customary international law on this and other norms related to national security and human rights in situations of terrorism in light of widespread State violations is complex, stratified, and varied.[148]

It should be stressed that States, particularly liberal democracies, should not completely disregard human rights when fighting terrorism.[149] Such a contention, however, is rooted in values and politics and not necessarily, or at least not always, in an overriding concern for utility.[150] The perspective advanced by Nobel Laureate Milton Friedman regarding government intervention in society, as a "balance sheet, listing separately the advantages and disadvantages. Our principles tell us what items to put on the one side and what items on the other and they give us some basis for attaching

[145] *See* Roberts, *supra* note 50, at 737-38.

[146] D'Amato, *supra* note 137, at 102. On D'Amato on statements versus actions as State practice, *see* Anderson, *supra* note 144, at 416, 434.

[147] Nuclear Weapons Advisory Opinion, *supra* note 66, at 839 (Schwebel J., dissenting) (emphasis added).

[148] According to Roberts, "[w]hile it is too early to tell what impact the US actions post-September 11 will ultimately have on human rights, it is clear that these actions have provided conceptual challenges to the structure of international human rights law". Roberts, *supra* note 50, at 748-49.

[149] For Dershowitz's perspective on where the balance should be struck, *see supra* note 104, at 165-222.

[150] Equating values and politics, *see* Klabbers, *supra* note 132, at 203.

importance to the different items",[151] goes to the core of the human rights issue and provides a useful template for considerations of policy prerogatives.

The best approach to Friedman's concept of a balance sheet in this context may be that which Vijayakumar articulates as relates to India, "an acceptable course between giving too little power to the government so that it is unable to deal with terrorism, and too much power so that an intolerable violation of human rights is risked".[152] These balanced interests naturally open themselves to interpretation, but phrasing the exercise in this way ensures that neither the community's right to security nor individuals' human rights can straightjacket the other. This approach also avoids the dangerous argument put forward by ICJ Judge Owada in his Separate Opinion in the *Wall Advisory Opinion*, according to which argument, as a matter of principle and based on the proportionality rule, military exigencies could never, even, presumably, on a scale of certain national annihilation, justify the human rights violations engendered by Israel's separation barrier.[153]

What An-Na´im says about interpretations of the Shari´a, that, "[w]hen all is said and done, the ultimate question would be a moral one, namely what *ought* to be the principle in the particular case or situation",[154] applies generally in this context.[155] Falk's assumption for the sake of argument that breaching human rights could increase national security but that this "would not … alone justify official behavior violative of basic rights"[156] is certainly a legitimate position, but it must be seen as an essentially moral choice.[157] It

[151] M. Friedman, *Capitalism and Freedom* 32 (1967).

[152] Vijayakumar, *supra* note 99, at 351. Brooks describes this as a "sweet spot that satisfies both the demands of power and of principle". D. Brooks, "Savagery's Stranglehold", *N.Y. Times*, 8 June 2006.

[153] *See* Wall Advisory Opinion, *supra* note 16, at para. 24 (Owada J., Separate Opinion).

[154] A.A. An-Na´im, "Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism", 31 *Germ. Y.B. Int'l L.* 307, 334 (1988).

[155] According to Gearty, "[t]he twin narratives of counter-terrorism and human rights share an important common feature: they each present themselves as being rooted in morality, as being concerned with either the procurement (human rights) or the defence (counterterrorism) of an objective good". Gearty, *supra* note 97, at 1.

[156] Falk, *supra* note 110, at 236.

[157] This resembles Koskenniemi's argument about the political nature of legal interpretation: "A court's decision or a lawyer's opinion is always a genuinely political act, a choice between alternatives not fully dictated by external criteria". M. Koskenniemi, "What Is International Law For?", in *International Law* 89, 105 (M.D. Evans ed., 2003).

is unclear why his morality, as much as anyone else's, should be considered inherently dispositive on the issue.[158]

It is with this in mind that one can approach, for example, Dershowitz's "ticking bomb" hypothetical on torture and the moral dilemmas involved.[159] On the whole, the human rights establishment has dismissed this hypothetical almost outright,[160] the United Nations Committee Against Torture, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture, and Arbour jointly stating on United Nations International Day in Support of Victims of Torture on 26 June 2006 that the very idea itself of arguments that seek to justify torture, regardless of context, is "anathema",[161] as if to suggest that the mere discussion of the appropriateness of a currently-accepted international legal norm, the absolute prohibition of torture, lies outside the boundaries of legitimate discourse.

Likewise, Bassiouni argues that "[t]orture, or torture by any other name, is legally, morally, and ethically reprehensible".[162] Unfortunately, this statement presents itself as an unassailable truism, as something that is sacrosanct and beyond reasoned debate and, in so doing, positions those who might disagree as necessarily supporting a reprehensible sense of legality, morality, and ethics. This is unfortunate, and it is a posture that installs what Fallaci would describe as "fear",[163] a type of thinking that she would refer to

[158] This is particularly the case given the fluid nature of rights. On the fluid nature of rights, *see* Klabbers, *supra* note 132, at 199-200.

[159] *See* Dershowitz, *supra* note 104, at 131-63. For a brief criticism of this hypothetical, *see* Bassiouni, *supra* note 46, at 259.

[160] As examples, *see* Bassiouni, *supra* note 46, at 259; Pejic, *supra* note 26, at 99-100.

[161] United Nations Committee Against Torture, the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture, and the United Nations High Commissioner for Human Rights, Joint Statement on the Occasion of the United Nations International Day in Support of Victims of Torture, 26 June 2006, *available at:* http://www.ohchr.org/english/about/funds/torture/docs/JointStatement26.06.06.pdf.

[162] Bassiouni, *supra* note 46, at 259. One can compare this with Hirsi Ali's description of Muslims who thoughtfully criticise the theological *status quo*. *See* A.H. Ali, *The Caged Virgin: An Emancipation Proclamation for Women and Islam* XII (2006) (stating that "any Muslim who asks critical questions about Islam is immediately branded a 'deserter.' A Muslim who advocates the exploration of sources for morality, in addition to those of the Prophet Muhammad, will be threatened with death, and a woman who withdraws from the virgins' cage is branded a whore").

[163] O. Fallaci, *The Force of Reason* 257-58 (2006) (describing this as "[f]ear of thinking and, in thinking, of reaching conclusions which do not match those of the formulas imposed by the others. Fear of speaking and, in speaking, of reaching a judgement which is different

as "intellectual terrorism".[164] One must constantly bear in mind Tomuschat's position that "the philosophical ought must be distinguished from the legal ought".[165]

It should at least be acknowledged that international law, as a construction of world politics and power,[166] may or may not coincide with one's morality and ethics, the content of the latter two elements of which has been debated for millennia.[167] Few, hopefully none, would today agree with United States Supreme Court Chief Justice Taney's analogy of a black slave in the United States to "an ordinary article of merchandise and property",[168] yet the legal authority as a matter of positive law of *Dred Scott v. Sandford* under the United States' constitutional system at the time was clear.[169] This is not to suggest that international law's current posture on torture is or is not justified: it may or may not be. Rather, there exists a need for reasoned debate on the issue that proceeds from acceptance of the assumption, however contentious, that "[m]en's freedoms can conflict, and when they do, one man's freedom must be limited to preserve another's".[170] It serves neither security nor human rights to deny this.

VII. CONCLUSION

United Nations Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967 John Dugard has said that the

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from the judgement accepted by most. Fear of not being sufficiently aligned, obedient, servile, and therefore of being condemned to the civil death with which inert or rather inanimate democracies blackmail the citizens. Fear of being free, in short. Of taking risks, of having courage").

164 *Ibid.,* 209.

165 C. Tomuschat, *Human Rights: Between Idealism and Realism* 2 (2003).

166 According to Krisch, "acknowledging that power plays a large role does not necessarily have any bearing on the justification *vel non* of an action or development. But it may give us some greater distance in assessing them". N. Krisch, "International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order", 16(3) *E.J.I.L.* 369, 408 (2005).

167 On a related point, *see* R.H. Bork, *The Tempting of America: The Political Seduction of the Law* 176 (1990) (asserting that "[i]t is essential to bear in mind the distinction between the reality of judicial power and the legitimacy or morality of the use of that power. … Power alone is not sufficient to produce legitimate authority").

168 Dred Scott v. Sandford, 60 *U.S.* 393, 451 (1857).

169 For a commentary by Bork on the case, *see* Bork, *supra* note 167, at 28-34.

170 Friedman, *supra* note 151, at 26. *See* Koskenniemi, *supra* note 157, at 99 (discussing assessments of security and freedom in the context of the European Convention on Human Rights).

very question of terrorism involves an "intense conflict in perception".[171] To a large extent, the questions which legal framework applies in the current counterterrorism context and where the balance should be struck between national security and human rights on particular facts and circumstances likewise trigger fundamental issues of perception. Such issues also demonstrate the interplay between the legal and the political and challenge the idea that these realms can be hermetically sealed from one another. Put bluntly, one's legal conclusions on these questions largely reflect whether she agrees with Lord Hoffmann in the House of Lords that Al Qaeda "do[es] not threaten the life of the nation[,] … does not threaten our institutions of government or our existence as a civil community"[172] or with Orwell, who, chastising his leftist comrades at the time of the Second World War, recognised that, "[h]owever little we may like it, toughness is the price of survival".[173]

[171] J. Dugard, "The Problem of the Definition of Terrorism in International Law", in *September 11, 2001: A Turning Point in International and Domestic Law?* 187, 189 (P. Eden & T. O'Donnell eds., 2005).

[172] A. & Others v. Secretary of State for the Home Department, [2004] *U.K.H.L.* 56, para. 96.

[173] G. Orwell, "The Lion and the Unicorn", in *Why I Write* 11, 85 (2004).